

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION
3 UNITED STATES OF AMERICA,) Case 1:14-cr-00397
4 Plaintiff,)
5 v.) Alexandria, Virginia
6 DAVID E. BURKE,) September 17, 2015
7 Defendant.) 9:04 a.m.
8) Pages 1 - 37

9 TRANSCRIPT OF SENTENCING
10 BEFORE THE HONORABLE ANTHONY J. TRENGA
11 UNITED STATES DISTRICT COURT JUDGE

12 APPEARANCES:

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24 THE DEFENDANT, DAVID E. BURKE, IN PERSON

25 COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 THE CLERK: Criminal Case 1:14-cr-397, *United*
2 *States of America v. David E. Burke.*

3 Will counsel please note their appearances
4 for the record.

5 MR. DWYER: Good morning, Your Honor. Kellen
6 Dwyer for the United States.

7 THE COURT: Good morning.

8 MR. AGNIFILO: Good morning, Your Honor.
9 Marc Agnifilo for David Burke with Stuart Sears as
10 well.

11 THE COURT: All right. Welcome.

12 We're here for sentencing. Have you provided
13 a copy of the presentence report to Mr. Burke, and have
14 you reviewed it with him?

15 MR. AGNIFILO: I have, Your Honor. Thank
16 you.

17 THE COURT: All right. Any objections other
18 than what's in your filings?

19 MR. AGNIFILO: Only in the filings, Judge.

20 THE COURT: All right. Do you want to be
21 heard any further on your objections?

22 MR. AGNIFILO: Yes, briefly. Thank you,
23 Judge.

24 We have two guidelines-based objections, and
25 I suppose they're somewhat related. The heart of the

1 issue, Judge, is that Mr. Burke was -- essentially, he
2 was a salesman. That's what he was. He didn't run
3 this company. He didn't truly have any independent
4 discretion over how the company ran. He basically had
5 to do everything at the behest of the person who was
6 the principal of the company, who was his direct boss,
7 this person named Tzvi Lexier. So he really didn't
8 have any independent discretion.

9 I know I make these arguments in my papers.
10 I don't want to belabor them, but I think it relates
11 both to the role in the offense and also to the amount
12 of loss that is going to be attributed to Mr. Burke.

13 I think at the end of the day, Mr. Burke
14 didn't really have any way of knowing the full amount
15 that Tzvi Lexier and the company as a whole was making.
16 So just for under principals of relevant conduct,
17 that's why I asked, Your Honor, to keep the loss amount
18 at essentially the commissions that Mr. Burke he,
19 himself, made.

20 So the two issues, I suppose, are related. I
21 know we go into this at length in our papers. I don't
22 need to belabor it at this point.

23 Thank you, Judge.

24 THE COURT: Counsel, any objections?

25 MR. DWYER: No, Your Honor.

1 If I could be heard in response.

2 THE COURT: All right.

3 MR. DWYER: First, on Mr. Burke's leadership
4 role, he was the director of sales and trained and
5 supervised the rest of the sales staff. He also
6 provided detailed instructions to the drop-shippers and
7 coordinated the shipping from overseas to the American
8 drop-shippers and eventually to the clients. He also
9 gave advice to the overseas shippers about how they
10 could sneak these drugs and devices past U.S. Customs.

11 From the papers, the defense has the idea
12 that because the Lexiers owned the company and
13 Mr. Burke didn't that he can't have a leadership role.
14 That's legally incorrect. You don't have to be an
15 owner of a company. You don't even have to be the
16 highest person in an organization to have a leadership
17 role. That's why the enhancement says that there's a
18 4-point enhancement if you're an organizer and leader,
19 not the organizer or leader.

20 Mr. Burke ran the day-to-day operations. The
21 company was owned by the Lexier family.

22 THE COURT: It wasn't clear to me what that
23 exactly meant in the filings, his involvement in the
24 day-to-day operations.

25 MR. DWYER: Sure. If I could give you maybe

1 a little bit on the structure of the organization.

2 THE COURT: All right.

3 MR. DWYER: Dr. Lexier and his wife, Sophie,
4 owned the company but had very little involvement at
5 all. Their son, Tsvi Lexier, was the CEO and also had
6 an equity interest. The very next person below that is
7 Mr. Burke. Mr. Lexier was not nearly as hands-on as
8 Mr. Burke was.

9 As I said, Mr. Burke worked out of Toronto,
10 supervised the sales staff, the people who would
11 actually call and try to get clients. Then when they
12 got an order, Mr. Burke would coordinate with the
13 overseas shippers who would ship the drugs to the
14 drop-shippers in the United States, like David Stein
15 and Rivka Rabi. These people are getting direct orders
16 from Mr. Burke. We included some messages in our
17 papers.

18 THE COURT: Right.

19 MR. DWYER: There's many, many more where
20 Mr. Burke is contacting David Stein every day saying,
21 What about this shipment? Has this gone out? Has that
22 gone out? He's contacting Rivka Rabi, who Your Honor
23 has gotten to know a little bit. She was no leader.
24 She was taking direct orders from Mr. Burke.

25 So in terms of kind of who everybody in the

1 organization would report up to, it would be Mr. Burke.
2 Very few of them had direct contact with Tzvi Lexier.
3 The only person who had much contact with Tzvi Lexier
4 was Burke. You'll see in a text message just weeks
5 before he was arrested, Mr. Burke himself says, I've
6 been the most influential part of this company since
7 day one.

8 This is reflected in the salary that he made.
9 Mr. Burke actually made more money from the company
10 than Tzvi Lexier and almost as much as Tzvi Lexier,
11 Reuven Mirlis, and Sophie Lexier put together.
12 Mr. Burke made \$1.3 million versus \$900,000 that Tzvi
13 made, \$415,000 that Reuven made, and Sophie wasn't paid
14 any money. She was just kind of on the board as a
15 figurehead.

16 So, you know, the idea that Mr. Burke was
17 just kind of following orders and didn't have any
18 discretion just doesn't fit the facts.

19 If I can be heard briefly on the loss amount.

20 THE COURT: Yes.

21 MR. DWYER: The company as a whole made over
22 \$30 million in proceeds. The government has stated
23 that the enhancement should be 20 points for a loss
24 between 7 and 20 million. There's any number of ways
25 to get to that number, but probably the least

1 controversial is that --

2 You know, Mr. Burke admits that he made
3 \$1.3 million. He admits that that was almost entirely
4 from commissions. So even if he were just looking at
5 the drugs that he himself sold to make those
6 commissions, that's easily over \$7 million because the
7 commission, from our understanding, is somewhere
8 between 15 and 20 percent of the sales.

9 If you're making \$1.3 million in commission,
10 you're selling way over \$7 million in drugs, and that's
11 not even counting the rest that was foreseeable as
12 someone who was overseeing others.

13 Finally, if I could just briefly be heard on
14 the comparison to the Gallant sentencing. In the
15 papers, Mr. Burke said that he should be compared to
16 Mr. Rochelle, who was a salesman at Gallant who was
17 recently sentenced to 12 months. Mr. Rochelle, first
18 of all, had a 5K motion because he was a cooperator.
19 Mr. Rochelle only made \$80,000 in commissions versus
20 \$1.3 million for Mr. Burke.

21 THE COURT: All right. Thank you.
22 Counsel.

23 MR. AGNIFILO: If I could, Your Honor. Thank
24 you.

25 THE COURT: Yes.

1 MR. AGNIFILO: I don't want to put too much
2 emphasis on the formal corporate structure because I
3 don't know that that's really here nor there. I mean,
4 he had no role in the formal corporate structure
5 whatsoever. He was just a salesman. To say that he
6 was the manager of the sales force, he did have that
7 title, but he had no equity in the business. I don't
8 know at the end of the day -- I don't know what the
9 Lexiers' personal finances are, but I think as owners
10 of the business, there's probably ways of them
11 realizing income from the business that they
12 essentially owned without it being deemed a salary.

13 The point that, I think, is important is that
14 he -- at most, Mr. Burke is a mid-level type executive.
15 I mean, there's nothing he can do truly on his own.
16 Everything he does is at the whim of Tzvi Lexier, and I
17 think the e-mail -- rather, the text message that the
18 government refers to is a revealing one. It's David
19 Burke essentially begging Tzvi to view him as valuable,
20 and there's two components to it. The government
21 focuses on, I guess, the self-aggrandizing component:
22 Look, Tzvi, I've been good for the company. I help
23 you. I do a lot of things.

24 But the reading between the lines, I think,
25 is really the heart and soul of that communication

1 which is I need you, my boss, to recognize me. I want
2 you, my boss, to recognize me. I mean, there's a clear
3 superior/inferior position between those two people,
4 which is why he's sending that message basically asking
5 Tzvi to recognize him as a valuable member of the
6 company.

7 He was a valuable member of the company
8 certainly, but here he is talking to his boss.
9 Obviously, he's feeling he's not getting the
10 recognition that he deserves, and the point of the fact
11 that he's even looking for this recognition is that
12 he's looking for recognition from someone who is
13 clearly a superior. I mean someone who can fire him,
14 who can reduce his commissions, who can increase his
15 commissions. I mean, there's really nothing that David
16 Burke is doing truly on his own.

17 He was an active salesman. I mean, the one
18 thing, I think, that we probably agree with the
19 government on is he was the most prolific, the most
20 active, the most successful salesman in the company. I
21 think we agree on that, and I think that's common
22 ground.

23 In terms of the overall decision-making for
24 the company, direction of the company, I mean, at one
25 point -- I know I reference it in my papers a few times

1 because I think it's a significant point -- Tzvi Lexier
2 seems to start another business in Montreal other than
3 the business he has in Toronto, and he has three known
4 principals -- I don't identify them in the public
5 filing -- meet with David Burke basically so Burke
6 could tell them, This is how you sell product.

7 Now, on the one hand, you could say, Oh,
8 David Burke is playing some supervisory type role, but
9 it really isn't because he has nothing to do with the
10 Montreal business. That's all the Lexier family. The
11 Lexier family decided, as a matter of overall corporate
12 governance, to start another business in Montreal that
13 has nothing to do with Burke. So it's just one of the
14 ways of highlighting the discrepancy in the different
15 roles.

16 I think what's also significant, Judge, is
17 David Burke -- and I know that the rough equivalent of
18 David Burke in the Gallant Pharma case got an actual
19 5K. We, quite frankly, tried get a 5K, and it didn't
20 work out. I think the reason it didn't work out is
21 itself somewhat significant. The first thing that
22 David Burke did when he was arrested is he spoke with
23 the agents. He was on the plane to Florida to see his
24 father. He gets arrested. He speaks with the agents.
25 He speaks with the agents, I think, at fair length and

1 gives them a lot of details. The initial word from the
2 government was that this was valuable information and
3 we're going to pursue it.

4 The problem is that Mr. Burke was arrested in
5 Florida. He was in Florida for a number of days. Just
6 the way the Bureau of Prisons gets folks around the
7 country, he was in Florida. Then he was in Oklahoma
8 City. Then he was in Atlanta. We just couldn't quite
9 get it all set up -- and it's difficult to do when a
10 prisoner is in transit -- to have another interview.
11 By the time he got to Virginia -- and I don't say this
12 through faulting the government in the least. I think
13 the government had him in and listened to him. But by
14 the time he got to Virginia, the government didn't need
15 him. I think others had stepped up, others who were
16 lower in the food chain than Mr. Burke, and the
17 government made a decision that the government often
18 does, that we're going to use these folks and we're not
19 going to use this guy. That's basically what happened.

20 Nonetheless, we brought Mr. Burke in to the
21 government. We were there for many, many hours, and I
22 think he provided important information. I don't know
23 because the government does their things. And I don't
24 always know what the government does, and it's not my
25 business. But I know that he provided important

1 information, I think, that went to the companies. At
2 the end of the day, the companies pleaded guilty, and
3 others pled guilty in this case.

4 I'm not saying that it's because of
5 Mr. Burke, but I know that Mr. Burke -- because I sat
6 in the meeting -- gave a tremendous amount of
7 information that, I think, was critical as part of the
8 government's case against the company. Not that the
9 government maybe didn't have similar information in
10 texts or from other folks, but I think Mr. Burke is
11 uniquely positioned to give information against Tzvi
12 Lexier and the Lexier family. And he did. That's
13 information that the government has.

14 It's my belief at this point that Mr. Lexier
15 was arrested in Canada and is awaiting extradition to
16 the United States. I think that will certainly round
17 out the case.

18 I think the all-important question, the
19 question that I've asked myself, and the question I've
20 tried to prepare for Your Honor -- because I think Your
21 Honor would certainly want to know the answer -- is at
22 some point, obviously, Mr. Burke knew this was an
23 illegal business. Maybe in the beginning he didn't
24 quite know. Maybe it wasn't clear. Maybe he had sort
25 of drank the proverbial Kool-Aid in the beginning, but

1 at some point, he knew. He knew flat out, and
2 everybody knew flat out. I don't know what the
3 position of the other defendants are on the case, but
4 at some point, everybody in this business knew it was
5 flat-out illegal. He did too, and he stayed.

6 The question, when I'm asking Your Honor for
7 a lenient sentence, is how do I fill that void. What
8 do I say to Your Honor in light of that to convince the
9 Court to give him a lenient sentence? I think a lot of
10 things go into this.

11 I think the first thing is there was a
12 measure of self-esteem he got from this job. It is,
13 really, the first thing he ever did well in his life.
14 He is someone who struggled in school. He had learning
15 differences. I don't mention that just for the
16 merciful aspect of someone with learning differences,
17 but I think it plays a role in the decisions that he
18 made. He had a hard time in school. His parents had
19 to hire a lawyer for him to even stay in school.

20 Then he goes, and he works for the Lexiers.
21 He's a salesman, and in the beginning, he thinks it's
22 legitimate. Then he thinks, well, maybe it's not fully
23 legitimate, but it seems like maybe it's a gray area.
24 I think that's a term that I've heard a lot in this:
25 It's a gray area.

1 After the Gallant Pharma case, no one can
2 really think this is a gray area anymore. Everyone can
3 only really see this case for what it was, which is at
4 this point it's illegal. Whether there's a way of
5 doing this legally or not, I don't know. But here it
6 wasn't being done legally. It was being done through
7 different manners of deception. He knew that, and he
8 didn't leave.

9 The two primary reasons he didn't leave:
10 One, he was making money for the first time in his
11 life, and his family needed the money. His wife needed
12 the money. He needed the money. He was having
13 expensive fertility treatments. He started at this job
14 when he was living in his father's basement. This job
15 not only gave him the money but I guess, in a sense,
16 almost made him a man. He could take care of his
17 family. He could move him and his wife out of the
18 basement. They could get an apartment on their own,
19 and he could pay for these fertility treatments, which
20 they're still trying to work through.

21 Then there's just the money. Your Honor sees
22 people every day who did bad things for money, and this
23 is not different in that regard. But I do think that
24 there are these other aspects to it that are mitigating
25 in nature.

1 He's been only remorseful since the very
2 second he was arrested. He put his money where his
3 mouth was in that regard and spoke to the government.
4 I mean, I know that some of the other defendants in
5 this case -- and I know the government's position is
6 that they weren't as culpable as Mr. Burke. They
7 weren't as immediately remorseful either. I mean,
8 some -- one defendant I'm thinking of in particular
9 pled guilty a week before trial. That's his right, and
10 that happens from time to time.

11 We didn't have that here. He showed remorse.
12 He showed meaningful remorse by speaking to the
13 government off the bat. He told the government flat
14 out: I want to cooperate if you'll have me. It turns
15 out the government doesn't need him or hasn't needed
16 him so far. Then he pled guilty, really, at the
17 earliest opportunity. Your Honor let him out of jail a
18 few months ago. Remember, we had a bail hearing here.

19 He's tried to understand why he did what he
20 did. He's been seeing a therapist. The therapist's
21 letters are in with the letters I gave to Your Honor.
22 He's volunteered at a religious charity. He's tried to
23 come to terms with this. This is an odd thing for me
24 to say I suppose, but he's really a fundamentally
25 honest person.

1 I think in his mind -- and I don't know what
2 the medical science turns out to be -- no one was
3 getting hurt. Now, I know there's issues with the
4 Botox and the cold Botox and the not cold Botox. But I
5 think in his mind for a long time, this was basically
6 beating -- the pharmaceutical companies had jacked up
7 prices, and this was a way of just getting the same
8 products less expensively.

9 Now, obviously, the Achilles' heel for us in
10 that argument could be viewed as the Botox issue, but I
11 don't think at the end of the day it is because there
12 really was a belief in the company that the Botox, even
13 if distributed in an uncool state, the worst that would
14 happen is that the Botox wouldn't work.

15 THE COURT: Well, there were other cold chain
16 products in addition to Botox.

17 MR. AGNIFILO: Yes, that's right, Judge. But
18 I think the belief was that it would affect the
19 efficacy of the product, that it wouldn't hurt people.
20 I think that's key to his personal ethics. I think he
21 does have a system of personal ethics. I've gotten to
22 know him pretty well over the last several months, and
23 I think he would not do anything to hurt people.
24 That's not who he is. That's just not who he is.

25 He was in this gray area, and he was in this

1 gray area heavy. He continued to do this even after
2 the Gallant Pharma prosecution when he knew that it was
3 no longer a gray area, but so did all the defendants,
4 Judge. All of the defendants in this, I mean, Your
5 Honor has looked at them and their individual
6 characteristics.

7 I think the similarities between Mr. Burke
8 and, say, David Stein, the similarities outweigh the
9 differences. There's no -- Mr. Burke made more money.
10 That's the first thing that leaps out as a difference,
11 and that's because he was a salesman. He was on
12 commission, and he made money from the commission. He
13 sold a lot of product. But at the end of the day,
14 David Stein -- I think it was \$13 million of product
15 went through David Stein's basement, and David Stein
16 was changing labels. David Stein knew everything about
17 the illegality of the business that Mr. Burke knew.

18 So I don't know that -- there's admittedly a
19 difference in degree, which is why when I thought what
20 a credible sentence would be for me to ask Your Honor
21 for, I came up with 18 months. I don't think it would
22 be a credible sentence for me to ask for the same
23 sentence as David Stein. I don't think you would view
24 that as a credible argument. So I tried to find a way
25 of showing that, yes, we are worse, and we admit it.

1 So we're not asking for an 8-month sentence. We're
2 asking for an 18-month sentence.

3 Here's why I think, one man thinks that's a
4 reasonable sentence. Your Honor is the only one who
5 will impose sentence, and then that will be the
6 sentence.

7 I think what the government has done in this
8 case is actually critically important. I think that
9 the government has a mission in this case, and I think
10 it's actually a good mission. I think the mission that
11 they have in this case is to show the world that this
12 has to stop: You can't do this anymore. Everyone
13 should be on notice after the Gallant case, after this
14 case that this isn't a gray area and this isn't some
15 kind of licensing issue. This is a crime. We have the
16 FDA for a reason. We have the safeguards we have in
17 this country for a reason. I think the government has
18 done a very important job at getting that message out,
19 and the message is out.

20 I think an 18-month sentence for a salesman,
21 even a lucrative salesman, is a very significant
22 sentence. It's a very significant sentence, I think,
23 as a matter of general deterrence. I think it sends
24 the message out. I think it shows in combination with
25 the forfeiture order that we're signing, in combination

1 with the fines to the corporation, I think, and with
2 the fact that -- and I salute the government for
3 arresting Tzvi Lexier and eventually going to bring him
4 to justice probably right in this courtroom. So I
5 think the deterrent impact of this sentence is an
6 important goal of sentencing, and I think it's met by
7 an 18-month sentence, which is a significant sentence
8 generally.

9 In terms of a sentence for one man and his
10 family, it's a very significant sentence. I mean, he's
11 trying to start his life. His wife is here toward the
12 end over there. They're a young couple. They've
13 struggled. They want to have a family. They've tried
14 to have a family. They've engaged in fertility
15 treatments to the cost of tens of thousands of dollars
16 to try to do that.

17 We all know David Burke is going to go to
18 jail at the end of today, but I think what seems fair
19 and right in a larger sense is that he do his jail term
20 and he come out not too much of an older man so that he
21 and his wife can get on with their lives and get on
22 with their family. He has a lovely family. They have
23 been supportive throughout. His parents, his brothers,
24 sisters, everyone has been supportive throughout. Many
25 of the letters are to Your Honor.

1 I just think that an 18-month sentence is a
2 sentence that is -- shows specific and general
3 deterrence. It shows respect for the law. I think it
4 shows all the things we needed to show under 3553(a).
5 It's certainly a serious sentence for Mr. Burke. I
6 think it's a sentence that's consistent, in my personal
7 opinion, with the other sentences both in this case and
8 the Gallant case. I think a sentence in excess of
9 that, I think, would be more heavily weighed against
10 Mr. Burke. I think this sentence is in keeping with
11 the way that these cases have been sentenced. I think
12 it sends the message that the government deserves sent
13 and the government wants sent.

14 So that's all I have, Judge.

15 THE COURT: All right. Counsel, I don't know
16 if you had completed what you wanted to say. Is there
17 anything else?

18 MR. DWYER: No, nothing further, Your Honor.

19 THE COURT: All right. Mr. Burke, you have
20 the opportunity to address the Court before it imposes
21 sentence. Would you like to say anything, sir?

22 THE DEFENDANT: Yes, Your Honor.

23 I just wanted to apologize to my family, my
24 friends, the Court for the embarrassment I've caused,
25 for the crime that I actively participated in, and just

1 an overall apology. Over the last nine months, I have
2 had plenty of time to review this in my head and go
3 over and over. There's really no excuse for what I
4 did. Once again, I apologize.

5 THE COURT: Why don't you have a seat.

6 This matter is before the Court for
7 sentencing in the case of *United States v. David Eli*
8 *Burke* with respect to his conviction on five counts,
9 including conspiracy, in violation of Title 18, United
10 States Code, Section 371, a Class D felony, punishable
11 up to 5 years, a \$250,000 fine, a \$100 special
12 assessment, and 3 years of supervised release;
13 smuggling goods into the United States, in violation of
14 Title 18, United States Code, Section 545, a Class C
15 felony, punishable by a term of up to 20 years, a
16 \$250,000 fine, a \$100 special assessment, and 3 years
17 of supervised release; introducing misbranded drugs and
18 devices in interstate commerce, in violation of
19 Title 21, United States Code, Sections 331(a) and
20 332(a)(2), a Class E felony, punishable up to 3 years
21 in prison, a \$10,000 fine, 1 year of supervised
22 release; a conviction for unlicensed wholesale
23 distribution of prescription drugs, in violation of
24 Title 21, United States Code, Sections 331(t),
25 333(b)(1)(D), also a Class C felony, punishable up to

1 10 years, a \$250,000 fine, 3 years of supervised
2 release; and conspiracy to commit money laundering, in
3 violation of Title 18, United States Code, Section
4 1956(h), a Class C felony, punishable up to 20 years in
5 prison, a \$500,000 fine, a special assessment of \$100,
6 and 3 years of supervised release.

7 This 34-year-old defendant was involved in
8 the illegal importation and distribution of misbranded
9 drugs for distribution and sale to doctors, medical
10 practices, and hospitals in the United States. On
11 December 3, 2014, a 25-count indictment was issued
12 against him and others charging him in 17 counts
13 pertaining to the illegal importation and unlicensed
14 sale of misbranded drugs together with a notice of
15 forfeiture of over \$18 million. He was arrested in
16 Florida on December 24, 2014, and released on
17 February 18, 2015, in this district on personal
18 recognizance and conditions, which he has fully
19 complied with. On March 9, 2015, he pled guilty to 5
20 of the 17 counts against him which the Court has just
21 identified.

22 The Court has reviewed and independently
23 determined the guideline sentence applicable to the
24 defendant and his offenses. The defendant has filed a
25 number of objections to the guideline sentence as

1 calculated by Pretrial Services, and the Court will
2 consider those at this time.

3 First, the defendant objects to the reference
4 in paragraph 41 of the presentence report to a
5 March 20, 2013, e-mail from another coconspirator, Tzvi
6 Lexier, regarding a doctor complaining that five out of
7 ten patients went to the emergency room after suffering
8 side effects from Botox injections. The objection is
9 on the grounds that the e-mail is not supported by any
10 evidence or corroboration.

11 The government has not provided in the face
12 of this objection any additional information in support
13 of the claims made in the e-mail, and there's no other
14 evidence in the presentence report that the defendant
15 at the time had received a copy of the e-mail or
16 otherwise knew the substance of the e-mail. For that
17 reason, the Court will strike the reference in the
18 e-mail to paragraph 41 in the presentence report, and
19 the presentence report will be amended accordingly.

20 Second, with respect to a second objection,
21 the defendant objects to the assessment of a 4-level
22 enhancement pursuant to Section 3B1.1 for leaders and
23 organizers. The Court has considered the arguments of
24 the defendant and the government, statement of facts,
25 and all other information available to the Court, as

1 well as the substance and commentary of that section
2 and concludes that while the defendant was not an
3 organizer of the conspiracy, owner of the corporate
4 defendants, or an ultimate decision maker, he was, in
5 fact, a commissioned salesperson.

6 He, nevertheless, engaged in activities
7 beyond that of a mere salesman. Those activities
8 included activities of a managerial or supervisory
9 nature, including the training of various members of
10 the sales team, including training how to mislead
11 clients, instructing drop-shippers on when and how to
12 ship packages, including advising them to use false
13 names and addresses and to ship cold chain products at
14 room temperature.

15 For these reasons, the Court concludes that
16 an enhancement is appropriate but that the enhancement
17 should be 3 levels rather than 4 levels.

18 Third, the defendant objects to using the
19 total profits gained during the conspiracy for the
20 purposes of calculating the guidelines. In that
21 regard, the defendant claims that the appropriate
22 amount to be used is the amount of his profits obtained
23 during his participation, which is approximately
24 \$1.3 million, principally on the grounds that Lexier
25 did not inform him of the profitability of the business

1 overall and Burke had no independent ability to
2 determine that profitability.

3 Here the loss amount to be used under the
4 guidelines is that amount paid for the misbranded drugs
5 with no credit for the value of those items or
6 services. Second, the loss amount attributable to any
7 particular defendant is that amount reasonably
8 foreseeable, that is that pecuniary harm that the
9 defendant knew under the circumstances, reasonably
10 should have known was a potential result of the
11 offense.

12 In this case, given the defendant's position
13 and the overall involvement with the sales activities
14 of the corporate defendants, the Court concludes that
15 under the structure of the sentencing guidelines and
16 the principles applicable to calculating the
17 guidelines, there is sufficient evidence that the
18 defendant was on notice of the overall business of the
19 corporate defendants.

20 For that reason, it is appropriate that the
21 overall gain that resulted from the offense be used to
22 calculate the guideline sentence even though he may not
23 have known or had access to the specific overall
24 profitability figures. Nevertheless, as the Court will
25 discuss in a moment, the Court has considered and will

1 consider the amount of the actual gain that this
2 particular defendant obtained in assessing an overall
3 sentence.

4 So based on these rulings, the Court
5 calculates the guideline sentence as follows: The base
6 level is 6 increased by 20 levels to reflect the total
7 gain as defined under the guidelines, an additional 2
8 levels because a significant part of the offense was
9 committed outside of the United States, an additional 2
10 levels for his conviction under Section 1956 of
11 Title 18, an addition 3 levels for his role resulting
12 in an overall offense level of 33. The defendant has
13 accepted responsibility and, therefore, is entitled to
14 a 2-level reduction. The government has moved for an
15 additional 1-level reduction based on his acceptance of
16 responsibility, which the Court grants, resulting in an
17 overall offense level of 30.

18 This is the defendant's first criminal
19 conviction and, therefore, he's in Category I. The
20 guideline sentence for an offense level 30 and criminal
21 history I is 97 to 121 months. The defendant is
22 eligible for probation under the statutory provision
23 but not under the guidelines. Supervised release is
24 recommended of 1 to 3 years with a fine of \$15,000 to
25 \$150,000 with a \$100 special assessment as to each of

1 the five counts.

2 The Court has also considered the sentencing
3 objectives under Section 3553 in light of all of the
4 information available to the Court in the presentence
5 report and the statement of facts. In that regard, the
6 Court has considered the nature and seriousness of the
7 offense which involved a conspiracy that began in
8 approximately April 2011 and continued through the
9 defendant's arrest in December 2014 all for the
10 purposes of smuggling into the United States and
11 distributing within the United States misbranded
12 prescription drugs and devices.

13 The members of the conspiracy were located
14 both in Canada and the United States and purchased from
15 coconspiring foreign suppliers prescription drugs and
16 devices manufactured and labeled for use in foreign
17 countries, including Turkey, Canada, France, Italy, the
18 United Kingdom, and other countries. They then caused
19 these drugs to be shipped into the United States, often
20 through circuitous routes to conceal the identity of
21 these drugs and their sources of supply.

22 These illegally imported drugs included
23 orthopedic injections, rheumatological infusions,
24 cosmetic devices, optomology products, and oncology
25 drugs, including numerous drugs that required

1 temperature controls during shipment and storage,
2 including such drugs as Botox and Lucentis, which is an
3 injectable prescription drug to treat macular
4 degeneration, as well as other drugs not approved for
5 use in the United States.

6 In order to avoid the regulatory functions of
7 the FDA, Customs and Border Protection, and Immigration
8 and Customs Enforcement-Homeland Security
9 Investigations, members of the conspiracy engaged in a
10 wide variety of actions to accomplish their illegal
11 purposes, including breaking up large shipments of
12 prescription drugs and devices into smaller packages to
13 be sent to the United States to multiple locations
14 under multiple names over multiple days to be
15 consolidated upon arrival after evading border
16 detection, shipping packages through the United
17 Kingdom-based services that allowed packages to be
18 delivered through the United States Postal Service with
19 less scrutiny, placing on Customs forms misleading
20 statements about the packages' contents and value, and
21 addressing packages to members of the conspiracy under
22 false names and titles.

23 There was frequent mishandling of
24 prescription drugs subject to strict temperature
25 requirements, such as cold chain products required to

1 be kept at a constantly low temperature for safe use
2 and failure to keep and provide appropriate records to
3 track the proper shipping and storage and transaction
4 history of drugs.

5 There also was the misbranding of these
6 smuggled and distributed prescription drugs, to include
7 inadequate directions for their use, the so-called FDA
8 black-box warnings, which are the strongest FDA
9 warnings required, as well as the required FDA approval
10 labels. In some instances, the labels failed to bear
11 the required information in the English language.

12 Once in the United States, the drugs were
13 forwarded to doctors and medical practices or
14 alternative locations, including the personal
15 residences and mailboxes of conspiring individuals
16 known as drop-shippers in the United States. These
17 drop-shippers regularly received packages of
18 prescription drugs and devices from abroad, removed
19 labels and other *indicia* showing that they had been
20 imported from abroad. They repacked the orders and
21 reshipped them to doctors and medical practices
22 throughout the United States in order to give the false
23 impression that the drugs were being distributed
24 domestically and legally.

25 The drugs used for the storage and handling

1 of prescription drugs consisted of such things as
2 unregistered commercial mailboxes, as well as the
3 backyards of personal residences, porches, basement
4 rooms, garages, kitchens, and other areas of storage,
5 none of which had the required lighting, ventilation,
6 temperature, humidity, or security required for the
7 safe handling and storage of prescription drugs.

8 Neither the defendant nor any of his
9 codefendants were licensed to sell or distribute
10 prescription drugs within the United States.

11 Once funds were obtained from the illegal
12 distribution of drugs, they were deposited into bank
13 accounts of the corporate defendant. Those funds were
14 then used to pay foreign suppliers of prescription
15 drugs, as well as commissions to the salespersons who
16 sold the drugs, as well as drop-shippers, and to the
17 owners of the corporate defendants.

18 As stated in the statement of facts, overall,
19 the conspiracy caused to be illegally imported and
20 distributed misbranded prescription drugs and devices
21 in the United States amounting to over \$18 million;
22 although, the amount of \$33 million has been cited in
23 related cases with this particular defendant receiving
24 personally approximately \$1.3 million.

25 As stated in the statement of facts admitted

1 under oath by Mr. Burke, his role was to participate in
2 the day-to-day operations of the corporate defendants.
3 In that role in working with the owner of the corporate
4 defendants and others, he communicated with
5 coconspirators or sales representatives and
6 drop-shippers in the United States. He tracked and
7 coordinated shipments from overseas into the United
8 States. He called the United States-based customers to
9 sell prescription drugs and devices from abroad and
10 engaged in the illegal importation and sales of
11 misbranded drugs using false names in connection with
12 his activities.

13 There's no doubt that the defendant was
14 centrally involved in the overall operations of a
15 substantial and extensive illegal importation and
16 distribution scheme. Whatever may have been the
17 defendant's initial assumptions about the legality of
18 what he was doing, there's no doubt that he quickly
19 understood what he was doing was improper and illegal
20 and continued and expanded his activities nonetheless
21 over time with what would appear to be rather
22 comprehensive knowledge concerning the overall scope
23 and operation of the scheme.

24 The Court also has no doubt that the
25 defendant's activities substantially contributed to the

1 ability of these corporate defendants and others to
2 successfully import and distribute these misbranded and
3 improperly transported and stored drugs, that he did so
4 knowing that what he was doing was illegal, and that as
5 a result, he knowingly and substantially contributed to
6 the distribution of drugs and devices that threatened
7 the public safety.

8 As to the defendant's personal history and
9 characteristics, this is the defendant's first
10 involvement in the criminal justice system, and the
11 Court has considered the extensive information and
12 material that has been provided to it concerning his
13 mental health issues, his educational, vocational, and
14 employment histories and capabilities, including the
15 many letters it has received from family and friends
16 that have spoken to his many good aspects.

17 It's against this information the Court has
18 considered the guideline sentence and the extent to
19 which it would appropriately reflect the level of
20 culpability of this particular defendant. In that
21 regard, the Court has considered the guideline sentence
22 was substantially driven by the \$18 million figure used
23 to calculate the loss amount even though the loss
24 amount does not reflect any particular loss. The Court
25 has also considered that in other contexts, the

1 defendant's gain of approximately \$1.3 million would be
2 used to calculate the guideline sentence. The Court
3 has considered that guideline sentence were it
4 calculated on that basis.

5 The Court has also considered the public
6 interest in this case, which includes both the need for
7 general and specific deterrence. With respect to
8 specific deterrence, the Court has considered the
9 defendant's background and prospects for recidivist
10 behavior, which the Court considers very low.

11 With respect to general deterrence, the Court
12 has considered, as I indicated, the public interest and
13 the role the defendant played within that scheme, the
14 dangers presented to the public by the distribution of
15 these drugs in the fashion that they were, and the
16 defendant's substantial role in the sales and
17 distribution of those drugs, including the volume of
18 drugs, the length of time he performed those
19 activities, his continued involvement in those
20 activities after clear and unmistakable warnings that
21 his activities were illegal, as well as the extent to
22 which others had assisted in his efforts.

23 The Court has also considered that while
24 there were occasional counterfeit drugs, these drugs
25 were for the most part drugs that had been manufactured

1 by the respective pharmaceutical companies and were not
2 counterfeit drugs. But having said that, the Court has
3 also considered that the manner in which these drugs
4 were shipped and treated gives little comfort to the
5 Court that the activities were any less dangerous than
6 they were.

7 The Court has also considered the public
8 interest in terms of alternative sentences that can
9 satisfy the sentencing objectives and also the public
10 interest in fashioning a sentence that allows this
11 first-time offender to rejoin the community and his
12 family within a reasonable period of time and resume
13 what the Court has every confidence can be a productive
14 and law-abiding life.

15 The Court has considered in that regard the
16 defendant's age, as well as the need to avoid
17 unwarranted sentencing disparities. In that regard,
18 the Court has considered the defendant's level of
19 culpability relative to others in the conspiracy, the
20 sentences already imposed on coconspirators, and the
21 sentences imposed in other cases of this type within
22 this court and elsewhere. The Court has also
23 considered the defendant's acceptance of
24 responsibility, as well as his immediate cooperation.

25 At the end of the analysis, the Court is

1 faced with a defendant who has obtained substantial
2 benefit through a fraudulent scheme that itself had
3 posed substantial damages or substantial risks and
4 threats to the safety of the public, and the Court has
5 considered sentences in other cases that have similar
6 characteristics.

7 The Court is in a position to impose sentence
8 at this time.

9 Mr. Burke, would you come to the podium,
10 please.

11 Mr. Burke, it will be the sentence of this
12 Court you be committed to the Bureau of Prisons for a
13 period of 26 months following which you'll be placed on
14 1 year of supervised release. The Court will not
15 impose a fine at this time in light of your forfeiture
16 obligation. The Court will impose a \$500 special
17 assessment for each of the counts. The sentence and
18 the supervised release of 1 year applies to each of the
19 5 counts and will be served concurrently. That will be
20 the sentence of the Court.

21 Is there anything further?

22 MR. AGNIFILO: Thank you.

23 THE DEFENDANT: Thank you.

24 MR. DWYER: Your Honor, the government has a
25 joint order of forfeiture which has been signed by the

1 defendant, as well as defense counsel.

2 (Documents are handed up to the Court.)

3 MR. AGNIFILO: Your Honor, the only issue is
4 I believe we're trying to effect a change in the bond.
5 Mr. Burke's sister -- and she wrote a letter to this.

6 THE COURT: I've seen it. The third-party
7 custodian needs to be changed?

8 MR. AGNIFILO: Yes.

9 THE COURT: All right. Any objection by the
10 government on that?

11 MR. DWYER: No, Your Honor.

12 THE COURT: Mr. Burke, come to the podium.

13 I'm going to allow you to voluntarily
14 surrender at a time and place to be designated to you
15 by the Bureau of Prisons through the Pretrial Services
16 and Probation office under whose supervision you'll
17 continue.

18 I'm also going to modify the conditions of
19 your bond to change the third-party custodian from your
20 sister to I believe --

21 What's the name of the individual?

22 THE DEFENDANT: Aaron and Daniella Schwartz.

23 THE COURT: -- Ms. Schwartz, who has been
24 reviewed and approved by Pretrial Services. You'll
25 remain under her custody until reporting to the Bureau

1 of Prisons.

2 THE DEFENDANT: Yes. Thank you.

3 MR. AGNIFILO: Would Your Honor consider
4 recommending Otisville?

5 THE COURT: In New York?

6 MR. AGNIFILO: Yes, Judge.

7 THE COURT: Yes. The Court will make that
8 recommendation to the Bureau of Prisons if it's
9 available and appropriate.

10 MR. AGNIFILO: Thank you, Judge. I
11 appreciate it.

12 THE COURT: All right. Anything else?

13 MR. DWYER: Nothing from the government, Your
14 Honor.

15 THE COURT: All right. Counsel and the
16 defendant are excused.

17 The Court will stand in recess.

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Time: 9:50 a.m.

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I certify that the foregoing is a true and
accurate transcription of my stenographic notes.

/s/
Rhonda F. Montgomery, CCR, RPR